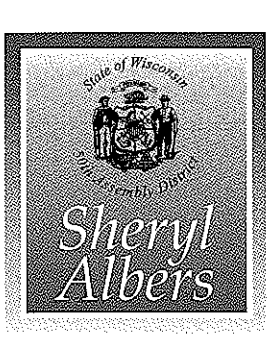

Rep. Albers Testimony on AJR 56
To the Assembly Committee on Elections & Constitutional Law
January 10, 2008

Members of the Committee, earlier this session I introduced Assembly Joint Resolution 30, which would prohibit the Supreme Court from assessing a fee on attorneys licensed to practice law in Wisconsin for the purposes of funding indigent legal aid. Subsequent to a public hearing in this committee last spring, Representative Gundrum and I discussed ways in which to improve the draft, with our goal being to preclude the Court from circumventing the State Constitution by levying surcharges, imposing "taxes" or other fees given other names. Therefore, I, along with Representative Gundrum, today offer AJR 56, which, as drafted and if approved by the public at referendum, would prohibit the Supreme Court from assessing fees without first obtaining the statutory authority to do so.

The issue is the clear separation of powers, and as delineated in Article Seven of the Wisconsin Constitution, the Judiciary has no express authority to levy taxes or fees for services such as legal defense funds for the poor. The public deserves the opportunity to vote on this matter; more particularly, the legal community and we as members of the Legislature, deserve the opportunity to educate the media and the public as to the boundaries of powers which have been overstepped by the Wisconsin Supreme Court. This is not the first instance of such overstepping, and surely, it will not be the last, but it is time to send a strong message, as to where the lines as to power and authority lie.

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Currently, each attorney seeking to practice in this state must pay annually $50 per year for indigent legal defense and it is collected at the same time that mandatory bar assessments are collected. Both of these fees are collected by the State Board of Bar Examiners office, and $50 indigent legal fee assessment is then deposited in the WISTAF Account, which in turn is redistributed to others who provide indigent legal defense. Traditionally, all licensing fees imposed were used only to regulate the body of licensed professionals and for no other purpose.

WisTAF is a Foundation -- the Wisconsin Trust Account Foundation. This particular foundation is not authorized by statute, and it exists only under court order. However, the court order is not the result of a lawsuit, or other case, but is the creation of the Supreme Court's own initiative. This Foundation administers the fund known as the Interest of Lawyer Trust Accounts, which in turn redistributed funds collected from lawyers and judges to other groups which provide legal services to the indigent/low-income individuals, as their income is deemed too low to obtain services of an attorney.

This mandatory assessment came into existence by order of the Supreme Court, and at the time was claimed to be temporary. The Court, however, later voted to permanently extend the WisTAF assessment. Furthermore, the Court has voted to expand the assessment to judges, and the order now under consideration by the Court would gives attorneys and judges an option of sending their assessments to a legal services organization of their choosing instead of WisTAF. This option has

yet to be implemented by written order, which must be approved by only a majority of the court.

I want to make one thing absolutely clear: I am in no way opposed to legal aid to the indigent or any other segment of our society. Access to competent legal counsel and equal access to the justice system are fundamental rights of every American. However, I believe that Justice Prosser was correct when he said in his dissent to the Supreme Court order mandating this assessment that "a laudatory end does not justify an illegitimate means."

Clearly, the most glaring illegitimacy in this Supreme Court assessment is that it basically amounts to a tax, for it is collected from a particular group, and then redistributed to another group, and it is not used strictly to regulate or investigate licensed attorneys.

The Wisconsin Constitution gives but one branch power to levy taxes -- and that one branch is the Legislature. Neither the Judiciary, nor the Governor, has authority to levy taxes/fees. For that very reason, agencies must come to the Legislature for approval of any fees they may have authority to impose, or the statutes directly set the fee which may be imposed.

The Legislature may delegate its taxing power to others, and has given such power to local governments and executive agencies, but the Legislature has not given such authority to the judicial branch. Furthermore, this assessment is a tax because

it goes beyond the cost of regulation and exists to raise revenue for a socially desirable program.

Another consideration for this committee is: if the Court believes that this assessment is proper and serves a legitimate purpose, what is to keep the Court from imposing even broader and larger assessments – for desirable computer technology, for needed interpreters, for forms, for other worthwhile, meritorious needs?

Wisconsin is recognized as a high tax state, and fees added to the mix unlawfully do not improve our tax status in anyone's perception. The best way to stop this illegitimate tax by the judicial branch, and to prevent a future court from imposing other taxes in the future, is passage of a constitutional amendment.

If this proposal is approved by citizens at referendum, the Legislature needs to be prepared to appropriate additional funding for indigent legal services. Wisconsin is behind neighboring states like Minnesota, Michigan, Illinois and Ohio who have appropriated general purpose funds for indigent legal services. While the 2007-09 state budget included $1 million for indigent legal aid, that amount only begins to address actual need. State Bar President Thomas Basting recently said, "As the Bar's *Bridging the Justice Gap* report documents, more than 500,000 low-income Wisconsin residents experience an unmet legal need each year that would benefit from some degree of legal assistance. Pro bono contributions by Wisconsin

lawyers are a vital part of the response to addressing the unmet legal needs facing low-income families."

Today, however, this committee should focus on the goal of giving the public the opportunity to tighten up constitutional language, which has apparently lead the Supreme Court to conclude that it can levy fees or other charges.

This is the strongest message we can put forth, although another means of achieving the same end would be for a lawsuit to be brought. Nonetheless, the Judicial Branch needs to be sent the message that we—the Legislature - do NOT appreciate their overstepping of boundaries, their usurpation of authority not granted.

A vote of passage is the first step to put the power of the purse back where it rightfully belongs.

ASSEMBLY COMMITTEE ON ELECTIONS AND CONSTITUTIONAL LAW

TESTIMONY OF ATTORNEY STEVEN LEVINE IN SUPPORT OF AJR 56, WHICH PROHIBITS THE SUPREME COURT OF WISCONSIN FROM ASSESSING FEES ON LAWYERS, JUDGES OR JUSTICES WITHOUT STATUTORY AUTHORITY

My name is Steve Levine, an attorney residing in Madison, and Past-President of the State Bar of Wisconsin. I am pleased and thankful to be able to testify in favor of Assembly Joint Resolution 56. I do so on my own behalf and not on behalf of the State Bar.

AJR 56 prohibits the Supreme Court from assessing a fee on any attorney, judge, or justice without statutory authority. AJR 56 is necessary to protect attorneys and judges, because in recent years the Supreme Court has expanded its authority into a number of areas which are essentially legislative in character rather than judicial and for which there exists no explicit authority in the Wisconsin constitution.

At present, the Supreme Court assesses fees on lawyers and/or judges to pay for the expenses of the State Bar of Wisconsin, Office of Lawyer Regulation (OLR), Board of Bar Examiners (BBE), Fund for Client Protection, and Wisconsin Trust Account Foundation (civil legal services for the poor). Pending before the Supreme Court are proposals to assess lawyers for the cost of enforcing rules against the unauthorized practice of law and to assess nonresident lawyers who appear in Wisconsin courts a ($250) fee to support the Wisconsin Trust Account Foundation. The future is certain to see more fee proposals.

None of the fees imposed by the Supreme Court are explicitly authorized by the Wisconsin constitution. The Supreme Court justifies these fees on the basis of "inherent authority" – authority which has no specific basis. "Inherent authority" essentially means "the authority to do whatever we want to do."

For example, nowhere is the Wisconsin Supreme Court authorized to impose an assessment on lawyers to pay the cost of providing civil legal services for the poor. Article 7 of the state constitution contains no express authority authorizing the court to tax or assess lawyers to fund legal services programs. Civil legal services programs are social programs which are within the jurisdiction of the legislature to fund through taxes or assessments. As the more democratic branch of government, the legislature is better able to make findings of fact and weigh the conflicting factors which are relevant to the funding of civil legal services programs. Yet, without any express constitutional authority, the Supreme Court has imposed a fee for this purpose.

Some fees imposed by the Supreme Court are reasonable regulatory fees to which no one would object – such as the fees paid to the OLR and BBE for the enforcement of legal ethics and educational requirements. Other fees are for social programs for which the Supreme Court has no express authority to assess and which usurp the legislature's prerogative. Assembly Joint Resolution 56 would prevent these abuses, which should be corrected by a constitutional amendment.

Respectfully submitted,

Steven Levine, 5010 Buffalo Trail, Madison, WI 53705, January 8, 2007

Supreme Court of Wisconsin

DIRECTOR OF STATE COURTS
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688

Shirley S. Abrahamson
Chief Justice

16 East State Capitol
Telephone 608-266-6828
Fax 608-267-0980

A. John Voelker
Director of State Courts

The Honorable Sheryl Albers
Chair, Assembly Committee on Elections
and Constitutional Law
Room 115 West, State Capitol
Madison, Wisconsin

RE: Assembly Joint Resolution 56, Prohibiting the Supreme Court From Assessing Fees Without Statutory Authority

Dear Representative Albers:

I regret that I will be unable to be present today to testify on Assembly Joint Resolution 56 that would amend the Wisconsin Constitution to prohibit the Supreme Court from assessing any fees on lawyers or judges without statutory authority. I would like to submit this written testimony for the committee's consideration.

Earlier this session I testified to your committee on AJR 30, a somewhat similar proposal. AJR 30 would have prohibited the Supreme Court from assessing any fees on lawyers to pay the cost of indigent legal services. The prohibition contained in AJR 56 is broader and more far-reaching than the earlier joint resolution heard by this committee.

The concerns I raised about AJR 30 are equally applicable to AJR 56. Therefore, I have attached my testimony from March 22, 2007 as a part of this submission. AJR 56 also "amounts to an unnecessary attempt to undercut the state Constitution's grant of superintending and administrative authority of all courts to the judicial branch." I would urge the committee to reject this approach.

Thank you.

Sincerely,

A. John Voelker
Director of State Courts

Attachment
cc: Members, Assembly Committee on Elections and Constitutional Law

Testimony provided during consideration of WisTAF's petition showed Wisconsin's poorest citizens increasingly lacked access to representation for basic civil legal services in critical areas, such as custody matters, domestic violence, housing, government benefits and health care.

The results of not being able to afford legal representation can be tragic, as individuals attempt to pursue their own rights and remedies without understanding the legal system. In turn, this presents a challenge for the courts in terms of staff time, administrative costs and decreased efficiency.

State and federal courts have affirmed that lawyers are more than just bystanders in a courtroom. As officers of the court, they have an obligation to help the Court ensure the effective administration of justice.

In 1902, the Wisconsin Supreme Court in Green Lake County v. Waupaca County, concluded: "(Lawyers) are admitted to the rank of the bar not only that they may practice their profession on behalf of those who can pay well for their services, but that they may assist the courts in the administration of justice."

WisTAF asked the Supreme Court to use its constitutional authority to approve the petition.

The state Constitution is a principled document that should not be misused as a forum to settle this issue.

Thank you.

Contact: A. John Voelker
Director of State Courts
16 E.
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(608) 266-6828

to protect their interests. Many delegates also believed that a constitution without equal representation of states in at least one house of Congress would not be approved by the smaller states. The large states gave up control of the Senate but kept their control of the House of Representatives. The House was also given important powers regarding taxation and government spending.

The result was that the more populous states would have more influence over laws to tax the people and over how the money would be spent. The larger states also would pay the larger share of any direct taxes imposed by Congress. The decisions of the House of Representatives, however, always would be subject to the check of the Senate, in which the small states had equal representation.

When the committee presented this compromise to the convention, it was bitterly fought by some members from the larger states, including Madison, Wilson, and Gouverneur Morris. They viewed the idea of state equality in the Senate as a step away from a national government, back toward the system under the Articles of Confederation. Delegates from the small states remained suspicious as well. Two delegates from New York, who had consistently voted with the smaller states, left the convention and did not return. The crisis was over when the compromise passed by one vote.

What do *you* think?

1. Are there good arguments today in support of continuing to divide Congress into two bodies, a Senate and a House of Representatives? If so, what are they?
2. What contemporary issues do you know about that involve conflict over the fairness of representation in Congress?
3. Why should senators be selected for six years and members of the House of Representatives for only two years? Do you think members of the House of Representatives would more effectively represent their constituents if they could serve longer terms?

What powers did the Constitution give to Congress?

The Framers intended the new government to be a government of **enumerated**—specifically listed—powers. They thought it was important to list the powers of each branch of government so that there would not be any confusion about what they could and could not do.

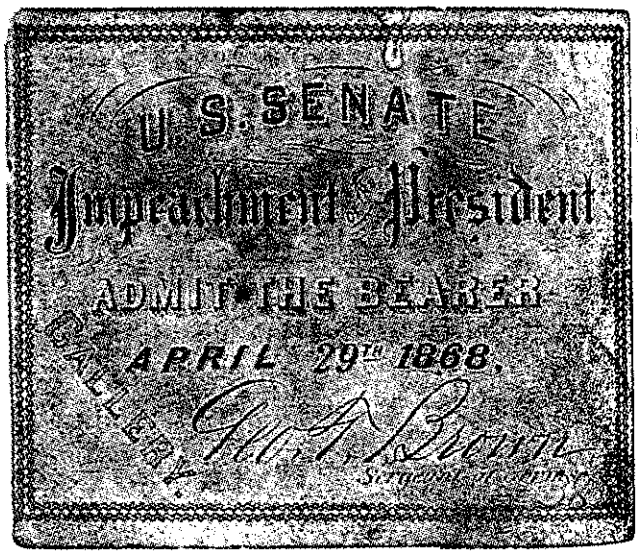
Most of the powers of Congress are listed in Article I, Section 8 of the Constitution. It includes such important matters as the power

- to lay and collect taxes
- to pay the debts and provide for the common defense and general welfare of the United States
- to regulate commerce with foreign nations, and among the several states
- to declare war
- to raise an army and navy
- to coin money

The Framers also intended the new system to be a government of **separated powers**, or, as political scientist Richard Neustadt has called it, "a government of separated institutions sharing powers."

Each branch of the government is given powers that enable it to check the use of power by the others. In Article I, Congress was given the power

- to **impeach** the president, other executive branch officials, or members of the federal judiciary and remove them from office.



Why did the Framers make it difficult to impeach government officials?

The executive and judicial branches also have checks, or controls, on Congress. The Framers specifically gave Congress the power to make all other laws that are "necessary and proper" for carrying out the enumerated powers. This is called the **necessary and proper clause**.

A judicial branch also would complete the system of separation of powers. They had fewer problems agreeing on how to organize the judiciary than they had with the other two branches. Many of the Framers were lawyers, and so most of them already agreed about how courts should be organized and what responsibilities and powers they should be given. They also agreed that all criminal trials should be trials by jury. This was a very important check, in their minds, on the power of the government.

The Framers created the **Supreme Court** as the head of the federal judiciary, and gave Congress the power to create lower federal courts. They also reached several other important agreements:

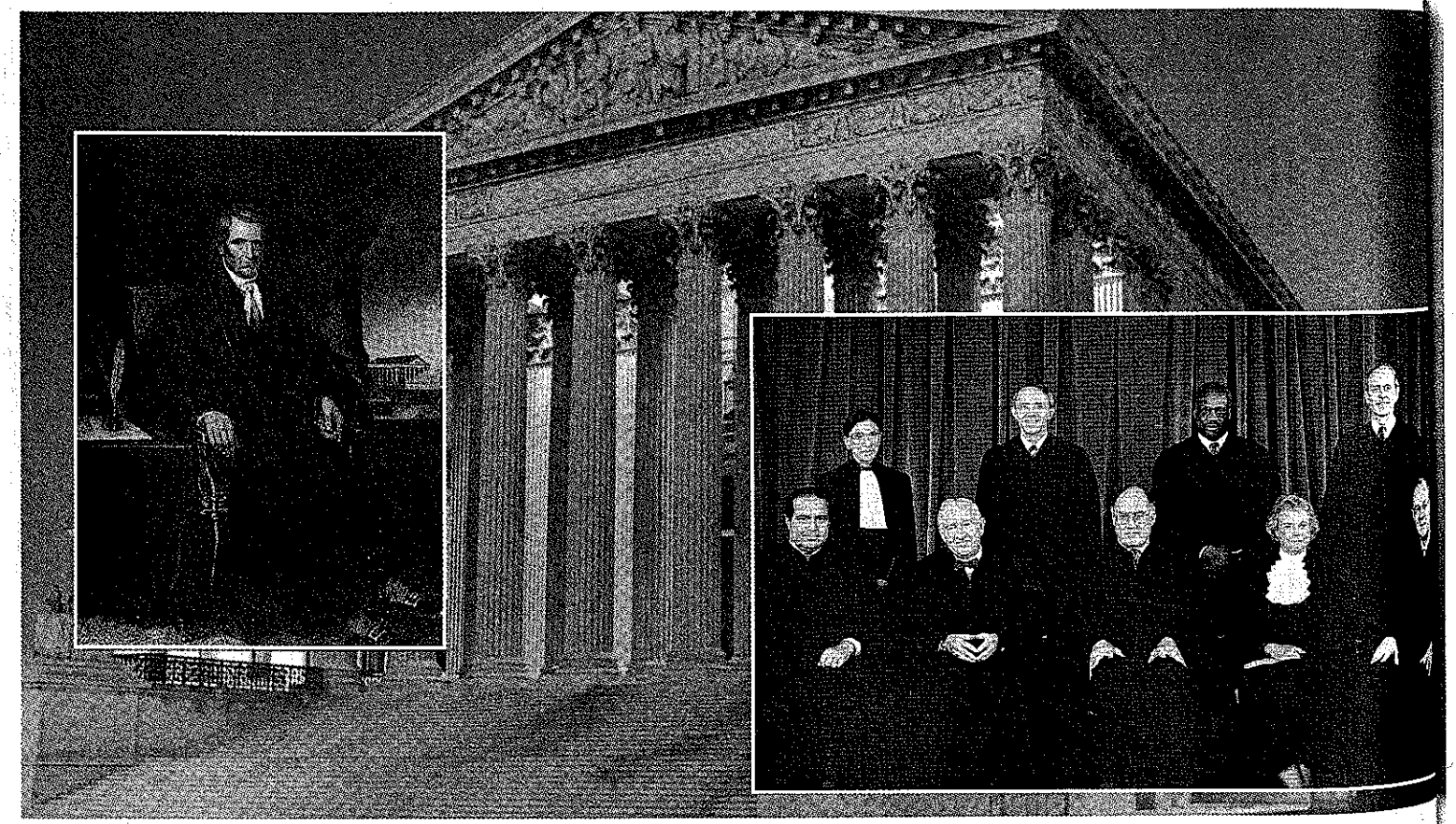
- Judges should be independent of politics so that they can use their best judgment to decide cases and not be influenced by political pressures.
- The best way to make sure that judges would not be influenced by politics was to have them nominated by the president. The president's nomination would need to be ratified by the Senate. The Framers thought that appointing the judges by this method rather than electing them would remove them from the pressures of political influence. In addition, the judges would keep their positions "during good behavior." This meant that they could not be removed from their positions unless they were impeached and convicted of "treason, bribery, or other high crimes and misdemeanors."

There was also a good deal of agreement about the kinds of powers that the judicial branch should have. The judiciary was given the power to

- decide conflicts between state governments
- decide conflicts that involved the national government

And finally, they gave the Supreme Court the authority to handle two types of cases. These are

- cases in which the Supreme Court has **original jurisdiction**. These are cases which the Constitution says are not to be tried first in a lower court, but which are to go directly to the Supreme Court. Such cases involve a state government, a dispute between state governments, and cases involving ambassadors.
- cases which have first been heard in lower courts and which are appealed to the Supreme Court. These are cases over which the Supreme Court has **appellate jurisdiction**.



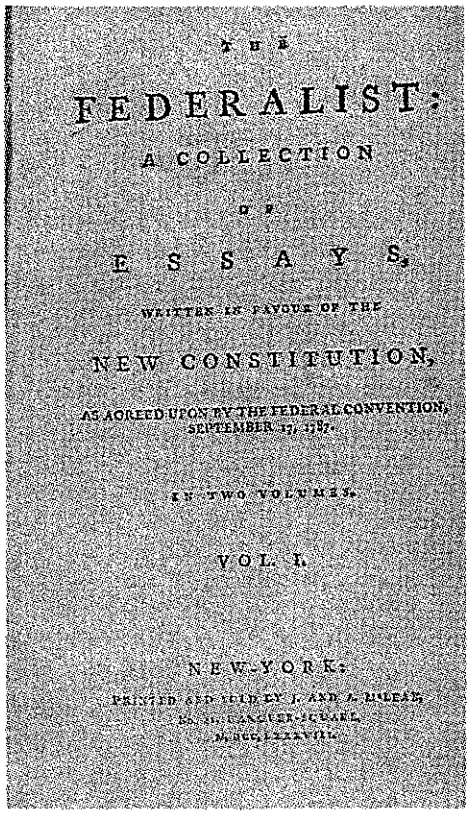
Why did the Framers think it was important to protect the independence of the judicial branch?

In defending the new Constitution, the writers of *The Federalist* were very skilled at using basic ideas about government that most Americans understood and accepted. They presented the Constitution as a well-organized, agreed-on plan for national government. The conflicts and compromises that had taken place during its development were not stressed in an attempt to present the Constitution as favorably as possible.

How did the Federalists respond to Anti-Federalists

The Anti-Federalists had some traditional arguments about what made a good government on their side as well. The Federalists were better organized, however. The Federalists' arguments in support of the Constitution claimed that it provided a solution for the problem of creating a republican government in a large and diverse nation. They were able to convince a significant number of people to support their position by the following three arguments:

1. The civic virtue of the people cannot be relied on alone to protect basic rights.
2. The way the government is organized will protect basic rights.
3. The representation of different interests in the government will protect basic rights.


THE
FEDERALIST:
A COLLECTION
OF
ESSAYS,
WRITTEN IN FAVOUR OF THE
NEW CONSTITUTION,
AS AGREED UPON BY THE FEDERAL CONVENTION,
SEPTEMBER 17, 1787.
IN TWO VOLUMES.
VOL. I.
NEW-YORK:
PRINTED AND SOLD BY J. AND A. M'LEAN,

What role did The Federalist *play in ratification of the Constitution?*

The civic virtue of the people could no longer be relied on as the sole support of a government that would protect the people's rights and promote their welfare. Throughout history, the Federalists argued, the greatest dangers in republics to the common good and the natural rights of citizens had been from the selfish pursuit of their interests by groups of citizens who ignored the common good. Therefore, for almost 2,000 years, political philosophers had insisted that republican government was only safe if the citizens possessed civic virtue. By civic virtue they meant that citizens had to be willing to set aside their interests if it was necessary to do so for the common good.

Recent experiences with their state governments had led a number of people to doubt that they could rely on the virtue of citizens to promote the common good and protect the rights of individuals. Many of the state legislatures had passed laws that helped people in debt at the expense of those to whom they owed money. These laws were seen by many as an infringement on property rights that were, after all, one of the basic natural rights for which the Revolution had been fought in the first place.

If the proper working of a republican form of government could not rely on the virtue of its citizens, what could it rely on? How could a government be organized so it would not be dominated by self-interested individuals or factions at the expense of others?

The way in which the Constitution organized the government, including the separation of powers and checks and balances, was the best way to promote the goals of republicanism. A major idea in *The Federalist* is that the national government set forth in the Constitution did not have to rely solely on the civic virtue of the people to protect citizens' rights and promote their welfare. The writers believed that it was unrealistic to expect people in a large and diverse nation, living hundreds of miles apart, to be willing to give up their own interests for the benefit of others.

The Federalists argued that the rights and welfare of all would be protected by the complicated system of **representation, separation of powers**, and **checks and balances** provided by the Constitution. They also believed that the method of electing senators and presidents would increase the possibility that they would have the qualities required of good governing officials.

The Federalists took the position that the Constitution's strength was that it provided for different branches of government that would represent the different interests of the people. They also claimed that this complicated system would make it impossible for any individual or faction—or even a majority—to take complete control of the government to serve its own interests at the expense of the common good or the rights of individuals.